THE HIGH COURT OF SIKKIM : GANGTOK

WRIT PETITION (C) NO. 27 OF 2003

In the matter of a petition under Article 226 of the Constitution of India.

Surajit Panigrahi,
R/o A.G. Colony,
Gangtok .... **Petitioner**

VERSUS

1. State of Sikkim,
Through the Chief Secretary,
Government of Sikkim,
Tashiling Secretariat,
Gangtok, Sikkim.

2. The Commissioner-cum-Secretary,
Government of Sikkim,
Department of Education,
Tashiling Secretariat,
Gangtok, Sikkim. .... **Respondents**

For the petitioner : M/s. S. K. Home Choudhury, Bijoy Saha and Miss S. Rai, Advocates.

For the respondents : M/s. S. P. Wangdi, Advocate-General, J. B. Pradhan, Government Advocate and Karma Thinlay, Assistant Government Advocate.

PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment: 6th May, 2004.

J U D G M E N T

R. K. PATRA, C.J.

Can the service rendered by the petitioner during the period from 12.9.1985 to 25.3.1989 on contract basis under the government of Sikkim be held as the qualifying

service? This is the moot question that arises for consideration in this writ petition filed by him.

2. Facts :

The petitioner is at present working as the Assistant Audit Officer in the office of the Accountant-General (Audit), Sikkim. Prior to his joining in the Accountant-General's office, he came to be appointed in the department of Education of the government of Sikkim as graduate teacher (Mathematics) in the pay scale of Rs.550-20-750-EB-25-950-30-1100 vide office order no. 752/Est/EDN. dated 10.9.1985 at annexure 3. He joined the said post on 12.9.1985. As he was not a local resident of Sikkim, his appointment along with 15 other such persons was on contract basis, whereas some others who were local candidates got appointments on regular basis. While working as such, the petitioner was promoted to the post of post-graduate teacher (Mathematics) in the pay scale of Rs.1320-30-1560-EB-40-2050-EB-2300 w.e.f. 1.8.1986 by office order no. 1367/G/EST dated 5.8.1986 at annexure 4. This appointment on promotion was also made on contract basis as he was a non-local. In the meantime, he had applied for the post of Auditor in the office of the Accountant-General, Sikkim in response to an advertisement made for the purpose. Following his selection and appointment as Auditor, he tendered his resignation

from the post of post-graduate teacher by giving one month's notice. On acceptance of the resignation, he joined as an Auditor on 27.3.1989 in the office of the Accountant-General, Sikkim.

3. The petitioner's claim is that the service rendered by him from 12.9.1985 to 25.3.1989 under the state government though technically contractual, for all intents and purposes it was in fact on regular basis *inasmuch* as during this period he earned annual increments in the pay scale, enjoyed leave and also got promotion. Therefore it should be treated as qualifying service for the purpose of computing his retiral benefits. His appointment was made on contract basis because he was taken as a non-local by mechanically applying rule 4(4) of the Sikkim Government Establishment Rules, 1974 (hereinafter referred to as the Establishment Rules). The Establishment Rules are supplementary to the Sikkim Government Services Rules, 1974 (in brief Service Rules). Neither of the rules received royal assent from the erstwhile Ruler of Sikkim by obtaining his signature or getting his seal affixed. The so-called rules were never published in the Sikkim Darbar Gazette. Consequently they were not 'laws in force' at the time of merger of Sikkim with the Union of India on 16th May, 1975. He thus cannot be discriminated against and denied the benefits basing on still-born and *non est* rules.

His further case is he is entitled to the benefit of counting the continuous period of service rendered by him under the state government as qualifying service for the purpose of pension and other retiral benefits under rule 26(2), rule 13 (first para) and rule 14(3) read with GOI decision (6) below rule 14 of Swamy's CCS (Pension) rules (1993 Edition) and agreement between the State of Sikkim and the Central Government (applicable from 7.2.86) incorporated in Section VII in appendix 12 of the said compilation. He accordingly submitted representation to the Accountant-General, Sikkim for counting the said period of service under the state government as qualifying service. The Accountant-General on examination of the matter was *prima facie* satisfied that the claim is legitimate. He sought clarification from the Comptroller and Auditor-General of India who however intimated that there is no provision for counting contract service rendered under the state government as qualifying service.

In obedience to the judgment dated 13.12.1995 passed by this court in writ petition nos. 27 of 1994, 30 of 1994, 4 of 1995 and 17 of 1995, the government of Sikkim constituted a Committee to consider the cases of non-local teachers for regularisation of their services. The petitioner made an application for consideration of his case by the Committee. On consideration of the representation, the

government in office memorandum dated 19.4.1997 at annexure 6 treated the past contract service rendered by the petitioner for the period from 12.9.1985 to 25.3.1989 as regular service for all purposes. The said office memorandum was subsequently illegally rescinded by the state government vide order dated 30.9.1997 which was challenged by him in this Court in writ petition no. 52 of 1997. By order dated 30.9.1997 this Court quashed the aforesaid order on the ground that it was passed in violation of the principles of natural justice. Thereafter the state government issued notice to the petitioner to show cause as to why the order dated 19.4.1997 at annexure 6 should not be revoked. The state government illegally without further giving opportunity of hearing by order dated 26.9.1998 cancelled the office memorandum dated 19.4.1997. The petitioner again impugned the validity of the said order dated 26.9.1998 in this Court by filing writ petition no. 522 of 1998. By judgment and order dated 5.9.2000 the writ petition was dismissed by this Court. The petitioner thereafter filed special leave to appeal no. 21389 of 2000 in the Supreme Court which was rejected by order dated 8.1.2000. The petitioner did not challenge the validity of the Establishment Rules and the Service Rules earlier because he was given necessary relief by the state government in its memorandum dated 19.4.1997 at annexure 6 which was

illegally cancelled subsequently. In the meantime, the state government regularised 28 number of non-local teachers in Mathematics who were initially appointed on contract basis. After the above fact of regularisation came to his knowledge, he filed a fresh representation at annexure 8 to the Chief Secretary of the government of Sikkim to consider his case. But till now no decision has been communicated on it.

4. The state government in its counter-affidavit resists the claim of the petitioner on the grounds *inter alia* that the constitutional validity of the Establishment Rules has been upheld by the Supreme Court in the State of Sikkim vs. Surendra Prasad Sharma AIR 1994 SC 2342. Some writ petitions (vide writ petition nos. 27 of 1994, 30 of 1994, 4 of 1995 and 17 of 1995) were filed in this Court by some ad-hoc teachers for regularisation of the non-local contract service rendered by them. Those writ petitions were disposed of by a common judgment dated 13.12.1995. In paragraph 28(4) of the said judgment, this Court held that the total period of service on ad-hoc or contractual basis, ignoring the period of break if any, is to be reckoned as qualifying service towards notional fixation of pay in the grade and also for the purpose of pension. Thereafter, the state of Sikkim filed a review petition bearing no. 5 of 1995 against the judgment dated 13.12.1995. The review petition

was disposed of by the order dated 23.5.1996 with the following observations:-

> "..... Moreover, in para 28(4) of the original judgment the affect of regularisation of service of such adhoc Teachers were taken care of and it was noted that total period of service on adhoc or contractual basis, ignoring the period of break if any, is to be reckoned as qualifying service towards notional fixation of initial pay in the grade and also for the purpose of pension. Therefore, the candidate whose services are going to be regularised cannot except anything further to the benefit ensured in para 28(4) of the judgment. Since we have directed to place the adhoc Teachers who are to be regularised ahead of the Teachers to be recruited directly, some amount of benefit in terms of seniority becomes available to them."

In obedience to the direction contained in the main judgment dated 13.12.1995 and the order dated 23.5.1996 in the review petition, the state government regularised the services of those non-local contract/ad-hoc teachers who came under the consideration zone. The petitioner was not a party in the above proceedings nor did he appear before the Committee constituted for the purpose of regularisation. By mistake however office memorandum dated 19.4.1997 at annexure 6 was issued giving him the benefits as indicated in paragraph 28(4) of the main judgment dated 13.12.1995. After the mistake was discovered, the state government issued another order dated 30.9.1997 withdrawing the benefit granted to him. Being aggrieved by such revocation

order, he filed writ petition no. 52 of 1997 in this Court with a prayer to quash the same. In course of the hearing of the said writ petition, the state government conceded that without following the principles of natural justice the order granting benefit was revoked. In view of the said fact, this Court by order dated 30.9.1997 quashed the revocation as it was passed in violation of the principles of natural justice. Thereafter the state government issued notice to the petitioner to show cause as to why the office order dated 19.4.1997 should not be revoked. The petitioner submitted representation and on consideration of the same, office order dated 26.9.1998 was made cancelling regularisation of service. The said order was again challenged by the petitioner in this Court in writ petition no. 522 of 1998 which was dismissed by judgment dated 5.9.2000. In the premises stated above, the state government presses for dismissal of the writ petition.

5. Admittedly the petitioner's appointment under the state government was on contract basis because he was not a 'local'. It was so made by applying rule 4(4) of the Establishment Rules which so far as material, runs as follows :-

> ***"(4) Appointment.–***
> (A) Appointment to service under the Government shall be by one or both the methods indicated below:

(a) Direct recruitment;
(b) Promotion from one grade to another.

(B) Direct recruitment shall include appointment on contract and appointment on deputation:

Provided these two types .... and further provided that (i) non-Sikkimese nationals may be appointed only when suitably qualified and experienced Sikkimese nationals are not available, and (ii) replacement of such appointees by suitable Sikkimese candidates may be made as and when available.

Mutually agreed terms shall apply to all appointments on contract. ....."

6. Shri Home Choudhury, learned senior counsel for the petitioner contended that the Establishment Rules did not receive the royal assent *inasmuch* as the Chogyal, the erstwhile Ruler of Sikkim neither signed them nor were they published in the Sikkim Darbar Gazette. Those rules are thus still-born and *non-est* and cannot be regarded as 'laws in force' at the time of merger of Sikkim with Union of India and therefore they cannot get protection under Article 371F(k) of the Constitution of India. Resultantly the so-called rule 4(4) must pass the test of Articles 14 and 16 of the Constitution of India and the action of the state government in appointing the petitioner on contract basis as he was a non-local is discriminatory being hit by the equality clause. To buttress his argument that the relevant rules did not receive the royal assent, he referred to the oral evidence

of Ranjit Singh Basnett, the then Secretary to the government of Sikkim in the department of Personnel, Administrative Reforms and Training which was recorded by this Court on 31.8.1994 in the case of one Satyendra Nath Roy vs. State of Sikkim (civil writ petition no. 13 of 1993). In his cross-examination, Basnett stated by referring to the original of the Sikkim Government Service Rules, 1974 that they were not signed by the Chogyal nor do they bear signature or even initials of anybody anywhere. They were also not published in the Sikkim Darbar Gazettee.

Knowing that the impugned rules were upheld in Surendra Prasad Sharma (supra), Shri Home Choudhury submitted that the Supreme Court proceeded on the assumption that the rules were in force at the time of merger of Sikkim which was not factually correct and therefore the said decision is *per incuriam* and is not binding under Article 141 of the Constitution of India. His further submission is that since the Establishment Rules are still-born they cannot be resuscitated by making them rules under the proviso to Article 309 of the Constitution of India.

Shri Wangdi, learned Advocate-General on the other hand contended that there is no scope to assume that the decision of the Supreme Court in Surendra Prasad Sharma (supra) proceeded on an erroneous hypothesis. Merely because this aspect was not expressly dealt with in that

case, it does not take away the binding effect of the judgment. Learned Advocate-General further submitted that the petitioner in his earlier writ petition did not raise this question and therefore he is barred to agitate it in the present proceeding.

7. In view of the rival contentions raised by the parties, it is necessary to refer to Article 371F, a special provision inserted to the Constitution of India for the state of Sikkim. Article 371F (k) so far as relevant reads as follows:-

> **"371F. Special provisions with respect to the State of Sikkim.–** Notwithstanding anything in this Constitution,–
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> .....
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> .....
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> .....
>
> (k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;"

As already indicated, the constitutional validity of rule 4(4) of the Establishment Rules came up for consideration before the Supreme Court in the case of Surendra Prasad Sharma (supra). After going through the history of merger of Sikkim with the Union of India, the Supreme Court in paragraph 13 of the judgment observed as follows:-

> "13. The Establishment Rules of 1974 were in exercise before the historical

developments led to Sikkim becoming an associate State in the first instance and later a full-fledged State of the Union of India. The President of India in exercise of power conferred by clause (1) of Art. 371F made the Adaptation of Sikkim Laws (No.1) Order, 1975, which defined the expression 'existing law' to mean any law in force before the appointed day i.e. 26th April, 1975, in the whole or any part of the territories comprised in the State of Sikkim and the term 'law' was defined to include any enactment, proclamation, regulation, rule notification or other instrument having, immediately before the appointed day, the force of law in the whole or any part of the territory now comprised in the State of Sikkim. It is, therefore, obvious from the broad definition of the term 'law' that the Establishment Rules of 1974 would fall within the fold of the expression 'existing law' and in any case 'law in force' within the meaning of clause (k) of Art. 371F of the Constitution.....

.....

Applying this test and bearing in mind the definition of the expression 'existing law' read with the definition of 'law', there can be no doubt that the Rules in question fall within the meaning of 'laws in force' under clause (k) of Art.371F. It is for that reason that the President exercised power in relation to the said law under clause (1) of Art.371F of the Constitution. This is further reinforced by the fact that these rules were adopted with modification under Art.309 of the Constitution, vide Establishment Department Notification No.202/Gen/Est. dated 17th November, 1980."

In paragraph 15 of the judgment the Supreme Court further held as follows:-

"15. Now we have already noticed that the Establishment Rules of 1974 were promulgated by the Chogyal of Sikkim as its absolute monarch for regulating the

> appointments to the Civil services of the State and they were undoubtedly in existence before Sikkim acquired the status of an associate State by the 35th Amendment and a full-fledged State of the Indian Union by the 36th Amendment. .... There can, therefore, be no doubt that Establishment Rules of 1974 which were in force in the territories comprised in the State of Sikkim prior to 26th April, 1975 would stand covered by the expression 'all laws in force' used in clause (k) of Art.371F and would continue in force even after the appointed date as existing law until amended or repealed. This meaning given to the said expression is consistent with the definitions of 'existing law' and 'law' employed in the Adaptation of Sikkim Laws (No.1) Order, 1975."

In paragraph 21 of the judgment, the Supreme Court, opined that:-

> "21. Article 371F, is as stated earlier, a special constitutional provision with respect to the State of Sikkim. The reason why it begins with a non obstante clause obviously is that the matters referred to in the various clauses immediately following required a protective cover so that such matters are not struck down as unconstitutional because they do not satisfy the constitutional requirement. Unless such immunity was granted 'the laws in force' would have had to meet the test of Art. 13 of the Constitution. This being the objective, existing laws or laws in force came to be protected by clause (k) added to Art. 371F."

In paragraph 22 of the judgment the Supreme Court upheld the validity of rule 4(4) of the Establishment Rules by observing as hereunder:-

> "22. The next question is whether the insertion of the introductory clause purporting to convey that the said rules are made under Art.309 of the Constitution with effect from 26th April, 1975 amounts to substitution of the Establishment Rules of 1974 to deny them the immunity conferred by clause (k) of Art. 371F?" ..... And since all laws in force in the territory of erstwhile Sikkim immediately before the appointed day could not be changed over-night, those existing laws had to be continued, more so because transition had to be smooth and gradual so that it does not give a sudden and severe jolt to the establishment. Besides, provision as to residential requirement could always be made by virtue of Art.16(3) of the Constitution. Therefore, if a provision in the Establishment Rules appears to offend Article 16(2), since such a provision is permissible by virtue of Art.16(3) and the Parliament permits its continuance by a special provision, Art.371F(k), the said requirement giving preference to 'locals' cannot be struck down as unconstitutional and any action based on the said provision would not be inconsistent with Part III of the Constitution."

8. The very point that the judgment of the Supreme Court in the case of Surendra Prasad Sharma (supra) proceeded as if the Establishment Rules were 'laws in force' was raised before this Court in civil writ petition no. 13 of 1993 (Satyendra Nath Roy vs. State of Sikkim). During the pendency of that matter, a petition was filed (vide miscellaneous application no. 11B of 1995) praying to amend the writ petition by incorporating the above point. A Bench of this Court by order dated 24.3.1995 allowed the

> the Constitution of India. While the matter was being disposed of with the observation as noted above it was submitted on behalf of the appellants that the issue whether Rule 4(4) of the above noted rules of 1974 was properly constituted by the Chogyal could be raised in any appropriate proceeding before the Hon'ble Supreme Court. The reaction of the Hon'ble Supreme Court on that submission was 'we do not propose to express any opinion in that behalf as the question presently is hypothetical.' .....
> The decision in Surendra Prasad's case continues to be the valid proposition with all its binding effect on all of us under Article 141 of the Constitution of India till there is any action before the Hon'ble Supreme Court to get its decision reviewed and reversed."

9. In view of what has been stated above, we have no hesitation to reject the contention that the judgment of the Supreme Court in the case of Surendra Prasad Sharma (supra) was rendered *per incuriam*. It may be stated with emphasis that the binding force of the Supreme Court decision cannot be questioned on the ground that it did not consider a particular question of fact.

10. It may also be noted that the Establishment Rules have been made by the Governor of the State of Sikkim in exercise of powers conferred under the proviso to Article 309 of the Constitution of India with retrospective effect from 1.4.1974 as per the Establishment Department notification no. 202/Gen/Est dated 17.11.1980. This fact has been noticed in paragraph 13 of the judgment by the

Supreme Court in the case of Surendra Prasad Sharma (supra). Law is well-settled that rules made under the proviso to Article 309 are legislative in character and can be given effect to retrospectively.

The state Legislature is competent to legislate either prospectively or retrospectively on the subject relating to recruitment and conditions of service appointed to state services and posts subject to constitutional limits. It has plenary powers of legislation. It can exercise that power directly. It is therefore wholly immaterial for the Legislature if the Establishment Rules are still-born. Since the rules made under the proviso to Article 309 are legislative in character it is equally irrelevant as to whether the Establishment Rules are still-born because such rules can be made afresh. The impugned rules having been made with retrospective effect have got constitutional protection under Article 371F(k) and cannot be invalidated.

11. The writ petition is liable to be dismissed on another substantial ground. As narrated above, the government by its office memorandum dated 19.4.1997 treated the contractual service rendered by the petitioner as a regular service for all purposes but the said memorandum was subsequently revoked which led the petitioner to file writ petition no. 52 of 1997 in this Court assailing the validity of the revocation. The very point urged in this writ

prayer of amendment. Against the said order, the state government went in appeal to the Supreme Court. By order dated 14.7.1995, the Supreme Court vide civil appeal nos. 6244-6245 of 1995 set aside the order of this Court accepting the amendment. This clearly goes to show that their Lordships of the Supreme Court were not impressed with the so-called plea that Surendra Prasad Sharma's case is *per incuriam*. This very ground was again raised before this Court in Ashok Kumar Singh and some others vide writ petition nos. 27 of 1994, 30 of 1994, 4 of 1995 and 17 of 1995. While disposing of the above writ petitions this Court in the judgment dated 13.12.1995 (vide paragraphs 13 and 14) held as follows :-

> "13. .... The matter was first agitated in another writ petition of identical subject being Civil Writ Petition No. 13 of 93 of this Court where two civil miscellaneous petitions were filed and numbered as 11B of 1995 and 15 of 1995 wherein the virus of the two Rules of 1974 was challenged in the form of subsequent pleading or petition for amendment. The prayer was allowed by a Division Bench of this Court on 24.3.95. Parties went to the Hon'ble Supreme Court and the same were numbered as Civil Appeal Nos. 6244 to 6249 of 1995 arising out of SLP (C) numbers 9575 to 9578 and 10450 and 10451 of 1995.
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> 14. The Hon'ble Supreme Court disposed of the matter by its order dated 14.7.95 with the observation that in view of the decision in Surendra Prasad's case (1994) 5 page 282 it had become the laws of the land having binding effect under Article 141 of

petition was available to him to agitate then but he did not do so. The order of this Court passed in the aforesaid writ petition stands concluded between the petitioner and the respondents. Therefore the petitioner is barred under the principle of constructive *res judicata* from initiating a fresh action to determine the present point of controversy between them because the same could have been raised by him in his earlier writ petition. The courts have been following the principle of constructive *res judicata* because it is a device to prevent multiplicity of judicial proceedings between the same parties.

12. For the aforementioned reasons, we do not find any merit in this writ petition which is liable to be dismissed.

13. Before parting with the case we may record that it is always open to the state government to make an order in exercise of its executive power to treat the contractual service rendered by the petitioner as continuous service for the limited purpose of notionally computing the same for his retiral benefits. The said period if tagged to his present service may result in some increase of his pension. The state government without being trammelled by the outcome of this writ petition is free to pass appropriate order if the petitioner makes any fresh representation in this regard.

14. In the result, the writ petition is dismissed. No costs.

(R. K. Patra)
Chief Justice
06.05.2004

I agree.

(N. Surjamani Singh)
Judge
06.05.2004

Dictation taken
&
typed by me
Dipak Saha